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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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12 Michael Ferguson,

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15 Plaintiff,

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17 v.
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20 Walmart,

21 Defendant.
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CV 12-04434 RSWL (Ex)

STATEMENT OF
UNCONTROVERTED FACTS AND
CONCLUSIONS OF LAW RE:
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT, OR, IN
THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT [27]

23 After consideration of all the papers submitted
24 pursuant to Defendant Walmart's ("Defendant") Motion
25 for Summary Judgment, or in the Alternative, Partial
26 Summary Judgment [27], the Court makes the following
27 findings of fact and conclusions of law:
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UNCONTROVERTED FACTS

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2 1. Plaintiff Michael Ferguson ("Plaintiff") was
3 hired as a "truck unloader" by Defendant on or about
4 February 21, 2007. Defendant's Statement of
5 Uncontroverted Facts ("SUF") # 39.

6 2. Starting on or about February 2008 to about
7 March 2011, Plaintiff's coworkers made racist comments
8 against him several times a day. Ferguson Deposition
9 Transcript ("Ferguson Depo.") 67:25-69:22.

10 Specifically, Plaintiff recalls that his coworkers,
11 Mario and Jose, called him a "mayate" (which Plaintiff
12 believes is Spanish for "nigger"), a "cockroach," and a
13 "black bug." Id. at 65:21-24. Further, Plaintiff
14 alleges that from February 2008 until January 2011, an
15 assistant manager for Defendant, Fernando, called him a
16 "mayate" several times a day. Id. at 86:19:87:22.

17 3. On June 17, 2010, Plaintiff filed a complaint
18 with Defendant regarding the inappropriate comments
19 being made against him. Notice of Lodgment of Exhibits
20 ("NOL"), Ex. 23.

21 4. On or about November 2010, someone put a noose
22 on a forklift at Plaintiff's work. Ferguson Depo.
23 91:16-92:6.

24 5. In December 2010, two individuals from
25 Defendant's corporate office interviewed all of the
26 unloaders and investigated the noose incident as well
27 as the racist comments being said to Plaintiff. Id. at
28 93:5-14.

1 6. Plaintiff was interviewed in this investigation,
2 and shortly thereafter, in January 2011, Fernando was
3 fired as assistant manager. Id. at 71:5-72:16.

4 7. After Fernando was fired, Plaintiff's coworker,
5 Jose, continued to call him racial names up until March
6 2011. Id. at 73:17-23.

7 8. Plaintiff complained to an assistant manager,
8 Sylvia Pope, regarding Jose's comments. Id. at 77:3-
9 77:25.

10 9. The racist comments against Plaintiff did not
11 stop after Plaintiff complained to Sylvia Pope. Id. at
12 73:17-23.

13 10. Notwithstanding his generally adequate
14 performance reviews (SUF ## 42, 43, 44, 47, 48),
15 Plaintiff was written up throughout his employment with
16 Defendant for meal and rest break violations,
17 productivity issues, disrespecting coworkers, poor
18 business judgment, and profanity. NOL, Ex. 16.

19 11. Plaintiff was written up on January 23, 2011
20 for mishandling company equipment and on March 2, 2011
21 for failing to follow policies regarding time clock and
22 payroll procedures. Id.

23 12. On or about March 8, 2011, pursuant to
24 Defendant's "Coaching for Improvement" policy,
25 Plaintiff was questioned for three hours regarding
26 harassment, using profane language, participating in
27 inappropriate physical activities (including slapping
28 and rough-housing with associates under his authority),

1 failing to report associates with weapons, and becoming
2 involved in several altercations, which violated
3 Defendant's Statement of Ethics and its
4 Discrimination/Harassment Prevention policies. SUF #
5 19, 21.

6 13. On March 8, 2011, Defendant decided to
7 terminate Plaintiff for "gross misconduct," effective
8 March 9, 2011 ("March 2011 discharge"). Id. at # 19,
9 21.

10 14. Plaintiff was diagnosed with anxiety on March
11 9, 2011 (Id. at # 9, 22), and his doctor recommended
12 that he be placed off work from March 9, 2011 through
13 March 27, 2011. NOL, Ex. 6.

14 15. On March 10, 2011, Plaintiff utilized
15 Defendant's "Open Door Policy" to explain his position
16 regarding the investigation and discharge and his need
17 to take a medical leave of absence. Ferguson Depo.
18 115:18-116:1.

19 16. On or about March 21, 2011, Defendant's store
20 manager, John, reinstated Plaintiff's job, granted
21 Plaintiff's leave of absence from work, and told
22 Plaintiff to tell Defendant when he was clear to return
23 to work. Id. at 124:14-16, 127:14-25.

24 17. Plaintiff did not attempt to return to work
25 until on or about September 2011. NOL, Ex. 31.

26 18. On or about September 2011, Plaintiff worked
27 for thirty minutes before being told by a personnel
28 officer that he had to clock out and leave. Ferguson

1 Depo. 34:1-37:21.

2 19. Defendant could not permit Plaintiff to work in
3 September 2011 without Plaintiff first providing a
4 medical release in accordance with its Leave of
5 Absence/FMLA policy, which he failed to provide. NOL,
6 Ex. 15.

7 20. Plaintiff was finally released to return to
8 work by his doctor on or about November 30, 2011. Id.
9 at # 28.

10 21. However, Plaintiff did not return to work when
11 he was medically released to do so. NOL, Exs. 7, 18,
12 31.

13 22. Defendant sent Plaintiff a letter on or about
14 January 11, 2012, which informed Plaintiff that his
15 leave of absence expired on July 20, 2011, and if
16 Plaintiff did not return to work or contact a salaried
17 member of management within three days of receipt of
18 the letter, Plaintiff's employment could end. SUF #
19 29.

20 23. Plaintiff did not respond to the January 11,
21 2012 letter, and was discharged for job abandonment on
22 or about January 25, 2012 ("January 2012 discharge").
23 Id. at # 31.

24 24. On July 28, 2011, while Plaintiff was on
25 medical leave, Plaintiff filed a charge with the EEOC
26 alleging disability discrimination and retaliation
27 ("First Charge"). Id. at # 1.

28 25. On or about August 11, 2011, Plaintiff was

1 issued a right-to-sue letter from the EEOC, in response
2 to the First Charge. Id. at # 2.

3 26. On or about January 3, 2012, Plaintiff filed
4 another charge with the EEOC, alleging race
5 discrimination, retaliation, and disability
6 discrimination ("Second Charge"). Id. at # 4.

7 27. Plaintiff's EEOC charge on January 3, 2012 was
8 referred to the California Department of Fair
9 Employment and Housing ("DFEH") which issued Plaintiff
10 a right-to-sue letter on February 9, 2012. Id. at # 5.

11 28. The right-to-sue letter indicates that the
12 letter was *mailed* on February 22, 2012. Ferguson
13 Decl., Ex. 4.

14 CONCLUSIONS OF LAW

15 1. Title VII and the ADA obligate Plaintiff to file
16 a timely administrative charge of discrimination with
17 the EEOC. MacDonald v. Grace Church Seattle, 457 F.3d
18 1079, 1081 (9th Cir. 2006).

19 2. Title VII establishes two potential limitations
20 periods within which a plaintiff must file an
21 administrative charge. Id. (citing 42 U.S.C. §
22 2000e-5(e)(1)). Generally, a Title VII plaintiff must
23 file an administrative charge with the EEOC within 180
24 days of the last act of discrimination. Id. at 1082.
25 However, the limitations period is extended to 300 days
26 if the plaintiff first institutes proceedings with a
27 "state or local agency with authority to grant or seek
28 relief from such practice." Id.

1 3. Failure to timely exhaust is treated as a
2 violation of a statute of limitations, though leaving
3 open defenses such as equitable tolling and estoppel.
4 See Draper v. Coeur Rochester, 147 F.3d 1104, 1107 (9th
5 Cir. 1998).

6 4. Further, Title VII obligates Plaintiff to file a
7 civil action in federal court within ninety days of
8 receiving a right-to-sue letter from the EEOC. Nelmida
9 v. Shelly Eurocars, Inc., 112 F.3d 380, 383 (9th Cir.
10 1997). This ninety day period is a statute of
11 limitations. Id. Therefore, if a claimant fails to
12 file the civil action within the ninety day period, the
13 action is barred. Id.

14 5. The continuing violations doctrine addresses the
15 issue of whether or not a claimant has timely filed a
16 charge within the statutory 180-day (EEOC) or 300-day
17 (state agency) period from the last discrete act of
18 discrimination, or during an ongoing claim of a hostile
19 work environment. Edwards v. Tacoma Public Schools,
20 No. C04-5656 RBL, 2006 WL 3000897, at *3 (W.D. Wash.
21 Oct. 20, 2006). The doctrine does not apply to the
22 90-day limitation period which runs from the date the
23 EEOC or state agency issues its "right-to-sue" letter.
24 Id.

25 6. The continuing violations doctrine does not
26 apply to Plaintiff's failure to file his lawsuit in
27 this Court with regard to his claims for disability
28 discrimination and retaliation for opposing unlawful

1 disability discrimination. Edwards, 2006 WL 3000897,
2 at *3.

3 7. Because Plaintiff filed this Action on May 22,
4 2012, 285 days after he was issued the right-to-sue
5 letter on his First Charge for disability
6 discrimination and retaliation, those causes of action
7 are time-barred.

8 8. To establish a prima facie disability
9 discrimination, Plaintiff must show that he (1) is a
10 disabled person within meaning of the ADA, (2) is a
11 qualified individual, meaning he can perform the
12 essential functions of his job, and (3) the employer
13 terminated his employment because of his disability.
14 Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246
15 (9th Cir. 1999).

16 9. If Plaintiff can set forth a prima facie case of
17 disability discrimination, Defendant must articulate a
18 legitimate, nondiscriminatory reason for discharging
19 Plaintiff. Snead v. Metropolitan Property & Cas. Ins.
20 Co., 237 F.3d 1080, 1093 (9th Cir. 2001). If the
21 Defendant meets this burden, then the burden shifts
22 back to Plaintiff to demonstrate a triable issue of
23 fact as to whether such reasons are pretextual. Pardi
24 v. Kaiser Permanente Hosp., Inc., 389 F.3d 840, 849
25 (9th Cir. 2004).

26 10. Plaintiff has failed to create a genuine issue
27 of material fact that he qualifies as "disabled" under
28 the ADA.

1 11. The FMLA creates two interrelated substantive
2 employee rights: (1) the employee has a right to twelve
3 work-weeks of leave in a twelve month period for an
4 employee's own serious illness or to care for family
5 members; and (2) the employee has a right to return to
6 his or her job or an equivalent job after taking such
7 leave. 29 U.S.C. §§ 2612(a), 2614(a); Bachelder v. Am.
8 W. Airlines, Inc., 259 F.3d 1112, 1119 (9th Cir. 2001).

9 12. In order to prevail on his claim for violations
10 of the FMLA, Plaintiff must demonstrate that his FMLA
11 protected leave was a negative factor in Defendant's
12 decision to discharge him. Bachelder, 259 F.3d at
13 1125. Plaintiff can prove this claim by using either
14 direct or circumstantial evidence, and no scheme
15 shifting the burden of production back and forth is
16 required. Id.

17 13. Plaintiff fails to provide the Court with any
18 direct or circumstantial evidence that his FMLA
19 protected leave was a negative factor in Defendant's
20 decision to discharge Plaintiff on March 8, 2011 or
21 January 25, 2012.

22 14. Title VII makes it "an unlawful employment
23 practice for an employer . . . to discriminate against
24 any individual with respect to his compensation, terms,
25 conditions, or privileges of employment, because of
26 such individual's race, color, religion, sex, or
27 national origin." 42 U.S.C. § 2000e-2(a)(1); Aragon v.
28 Republic Silver State Disposal, 292 F.3d 654, 658 (9th

1 Cir. 2002).

2 15. To establish prima facie racial employment
3 discrimination, Plaintiff must show that (1) he belongs
4 to a protected class, (2) he was qualified for the
5 position, (3) he was subjected to an adverse employment
6 action, and (4) that "similarly situated individuals
7 outside [their] protected class were treated more
8 favorably or other circumstances surrounding the
9 adverse employment action give rise to an inference of
10 discrimination. McDonnell Douglas Corp. v. Green, 411
11 U.S. 792, 802 (1973); Aragon, 292 F.3d at 658.

12 16. If Plaintiff can set forth a prima facie case,
13 the burden of production shifts to Defendant to
14 articulate a legitimate, nondiscriminatory reason for
15 discharging Plaintiff. McDonnell, 411 U.S. at 802.

16 17. If the Defendant meets this burden, then
17 Plaintiff has the burden to demonstrate a triable issue
18 of fact that Defendant's reasons are really a pretext
19 for racial discrimination. Aragon, 292 F.3d at 661.

20 18. Although Plaintiff has met his burden of
21 setting forth a prima facie case, Defendant has
22 articulated a legitimate, non-discriminatory reason for
23 initially discharging Plaintiff on March 8, 2011
24 ("gross misconduct"), and for ultimately discharging
25 Plaintiff on or about January 25, 2012 ("job
26 abandonment").

27 19. Plaintiff fails to offer any evidence that
28 Defendant's employment decisions were merely pretext

1 for race discrimination.

2 20. Under a "hostile work environment" theory,
3 Title VII is violated when the workplace is permeated
4 with discriminatory behavior that is sufficiently
5 severe or pervasive to create a discriminatorily
6 hostile or abusive working environment. Harris v.
7 Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

8 21. To make a prima facie case of a hostile work
9 environment, a person must show that: (1) he or she was
10 subjected to verbal or physical conduct of a racial
11 nature, (2) this conduct was unwelcome, and (3) the
12 conduct was sufficiently severe or pervasive to alter
13 the conditions of the victim's employment and create an
14 abusive working environment. Manatt v. Bank of
15 America, NA, 339 F.3d 792, 798 (9th Cir. 2003).
16 Additionally, the working environment must both
17 subjectively and objectively be perceived as abusive.
18 Harris, 510 U.S. at 21-22.

19 22. To survive summary judgment, Plaintiff must
20 show the existence of a genuine factual dispute as to:
21 1) whether a reasonable African-American man would find
22 the workplace so objectively and subjectively racially
23 hostile as to create an abusive working environment,
24 and 2) whether Defendant failed to take adequate
25 remedial and disciplinary action. See McGinest v. GTE
26 Service Corp., 360 F.3d 1103, 1113 (9th Cir. 2004).

27 23. Plaintiff provides sufficient evidence to
28 create a genuine issue of material fact that a

1 reasonable African-American would find the workplace so
2 objectively and subjectively racially hostile as to
3 create an abusive working environment.

4 24. Having determined that Plaintiff has presented
5 a triable issue of whether he was subjected to a
6 hostile work environment, the Court must decide whether
7 Defendant can be liable for the harassment. Little v.
8 Windermere Relocation Inc., 301 F.3d 958, 968 (9th Cir.
9 2001) (citing Nichols v. Azteca Restaurant Enterprises,
10 Inc., 256 F.3d 864, 875 (9th Cir. 2001)); See also
11 Meritor, 477 U.S. at 70-72 (noting that a Title VII
12 plaintiff must also provide a basis for holding her
13 employer liable for the harassment).

14 25. An employer's liability for harassing conduct
15 is evaluated differently when the harasser is a
16 supervisor as opposed to a coworker. McGinest, 360
17 F.3d at 1119.

18 26. An employer is vicariously liable for a hostile
19 environment created by a supervisor, although such
20 liability is subject to a two-pronged affirmative
21 defense - (1) "that the employer exercised reasonable
22 care to prevent and correct promptly any harassing
23 behavior;" and (2) "that the plaintiff unreasonably
24 failed to take advantage of any preventive or
25 corrective opportunities provided by the employer or to
26 avoid harm otherwise." See Nichols, 256 F.3d at 877.

27 27. Plaintiff has raised a genuine issue that
28 Defendant did not promptly correct Fernando's harassing

1 behavior.

2 28. As to liability for actions by coworkers,
3 "employers are liable for failing to remedy or prevent
4 a hostile or offensive work environment of which
5 management-level employees knew, or in the exercise of
6 reasonable care should have known." McGinest, 360 F.3d
7 at 1119. An employer may nonetheless avoid liability
8 for such harassment by undertaking remedial measures
9 "reasonably calculated to end the harassment." Id.
10 "The reasonableness of the remedy depends on its
11 ability to: (1) 'stop harassment by the person who
12 engaged in the harassment;' and (2) 'persuade potential
13 harassers to refrain from unlawful conduct.'" Id. To
14 be adequate, an employer must intervene promptly. Id.
15 (citing Intlekofer v. Turnage, 973 F.2d 773, 778 (9th
16 Cir. 1992)).

17 29. Plaintiff has raised a genuine issue that
18 Defendant did not promptly stop harassment by
19 Plaintiff's coworkers.

20 30. The anti-retaliation provisions of Title VII
21 forbid retaliation against an employee or job applicant
22 who has made a charge, testified, assisted, or
23 participated in a Title VII proceeding or
24 investigation. 42 U.S.C. § 2000e-3(a); Burlington
25 Northern & Santa Fe Ry. v. White, 548 U.S. 53, 56
26 (2006).

27 31. The plaintiff must establish a prima facie case
28 of retaliation by demonstrating: 1) he engaged or was

1 engaging in activity protected under Title VII, 2) the
2 employer subjected him to an adverse employment
3 decision, and 3) there was a causal link between the
4 protected activity and the employer's action. Yartzoff
5 v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987).

6 32. To establish causation between a protected act
7 and an adverse employment action, Plaintiff must
8 demonstrate that engaging in the protected activity was
9 one of the reasons for the adverse employment action.
10 Villiarimo v. Aloha Island Air, 281 F.3d 1054, 1064-65
11 (9th Cir. 2002).

12 33. The Ninth Circuit has recognized that in some
13 causes, causation can be inferred from timing alone;
14 however, the adverse employment action must have
15 occurred fairly soon after the employee's protected
16 expression. Id.

17 34. If the plaintiff establishes a prima facie
18 case, the burden shifts to the employer to offer a
19 legitimate, non-retaliatory reason for the adverse
20 employment action. Davis v. Team Elec. Co., 520 F.3d
21 1080, 1088-89, 1091 (9th Cir. 2008). If the employer
22 offers such a reason, the burden then shifts back to
23 the plaintiff to show that there is a genuine dispute
24 of material fact that the employer's proffered reason
25 for the challenged action is pretextual. Id. at 1091.

26 35. Plaintiff fails to set forth a prima facie case
27 of retaliation for 1) filing a workers' compensation
28 claim and 2) complaining of race discrimination against

1 Defendant.

2 36. Although Plaintiff sets forth a prima facie
3 case of retaliation for filing two charges with the
4 EEOC against Defendant, Plaintiff fails to articulate a
5 valid argument as to why Defendant's legitimate, non-
6 discriminatory reasons are merely a pretext for
7 retaliation.

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12 **IT IS SO ORDERED.**

13 DATED: January 2, 2014

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15 RONALD S.W. LEW

16 **HONORABLE RONALD S.W. LEW**

17 Senior U.S. District Judge
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